

2015 APAAC Annual Legal Assistant Conference

May 1, 2015
Prescott Resort & Conference Center
Prescott, Arizona



DUI TRENDS & UPDATES

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Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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Arizona DUI Updates

And Reminders

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TSRP Services

- DUI & traffic training
- Assistance with motions & legal issues
- Bank of materials on DUI defense experts
- TSRP E-mail list
- Three-day DRE School for Prosecutors/LAs
- Misc. - *amicus* briefs, articles, manuals etc.



APAAC on Demand Presentations

- Basic Motion Practice
 - The Rules (pre & post-trial)
 - Substantive - Rule 8, voluntariness, *Miranda*, right to counsel
 - Suggestions for evidentiary hearings
- Search & Seizure for Traffic Cases
- Discovery (DUI)
 - Overview
 - Responding to defense motions to compel & for sanctions
- Victim's Rights Enforcement

APAAC on Demand Presentations

- *Corpus Delicti* Rule
- Fingerprint Analysis
- Chemical Tests and Second Samples (DUI)
- Human Trafficking
- Auto Theft
- Forensic DNA Analysis
- Special Actions
- DUI (FSTs)
- ROC Main Program
- Rule 404 Presentation
- Human Elements
- AZ Compact

Rule Changes

Rule Change

- Memorandum Decisions may be cited for persuasive value, but only if:
 1. issued on or after 1/1/15
 2. no opinion adequately addresses issue before the court &
 3. it hasn't been depublished
- Citation must indicate it's a memorandum decision
- Must provide either a copy or a hyperlink
- There is no duty to cite to a memorandum decision

Rule 11(c), *Rules Supreme Ct.* (amendment)

Out of State Memorandum Decisions

- Per Justice Pelander - May also be cited

Make Defense do it Correctly

- If defendant cites ensure:
 - After 1/1/15
 - No published opinion adequately addresses the issue
 - Not depublished
 - Indicated it is a memorandum decision
 - Provided a copy/hyperlink
- If rule not followed:
 - Call the defense on it!!
 - Move to strike

Content of Complaints

- ... The constitutional requirement that a complaint be made under oath is satisfied by an electronic oath or affidavit containing an electronic signature, made by a law enforcement officer or agency representative under penalty of perjury.
- b. Upon filing a charging document in a criminal case in which a defendant is charged with any offense listed in A.R.S Title 13, chapters 14, 32, 35 or 35.1 or in which the victim was a juvenile at the time of the offense, the prosecuting agency shall advise the clerk that the case is subject to the provisions of Supreme Court Rule 123(g)(1)(C)(ii)(h).
- Rule 2.3, Rules of Criminal Procedure (amendment)

Post-Conviction DNA Tests

Anyone convicted & sentenced for felony may petition court at any time for DNA testing of any evidence in possession or control of court or state, related to the investigation or prosecution that resulted in the conviction, & may contain biological evidence.

Rule 2.3, Rules of Criminal Procedure (amendment)

Rule Changes

- *Criminal Procedure Rule 12.5* amended to allow an in-custody witness into grand jury proceedings with guard.
- *Criminal Procedure Rule 24.2(e)* upon request of the State, the court may vacate the judgment if:
 - clear & convincing evidence establishes defendant did not commit the crime
 - conviction was based on an erroneous application of the law.

Motion to Vacate Judgment

- Any time after entry of judgment & sentence, upon request of the State, Court may vacate judgment if:
 - 1) Clear & convincing evidence establishes defendant did not commit the offense
 - 2) Conviction was based on erroneous application of the law

Rule 2.3, Rules of Criminal Procedure (amendment)

Rule Changes

- Significant changes to *Rules of Civil Appellate Procedure*.
- Numerous changes to *ethical rules* responding to changes in technology.
- Changes to lawyer admission process.

Rule Reminders:

Discovery Rules Reminders

Know & Use the Rules & Comments

- ✓ Rule 15.7(b)
 - > no sanctions hearing w/o good faith certificate
- ✓ Rules 15.7(c)
 - > If defense fails to disclose State's duty to disclose ceases – except for *Brady* material (good for motion responses)
- ✓ Rule 15.4(d)
 - > disclosed materials shall not be disclose to the public. Only to others if necessary for conduct of case.

State's Automatic Duty to Disclose

Rule 15.1(D) must make available if in our possession or control:

- Names, addresses & all relevant written or recorded statements of witnesses intend to call
- All statements of the defendant
- All law enforcement reports
- Experts and their results
- List of evidence to be used at trial
- Defendant's felony convictions or prior acts intends to use at trial
- All information which tends to mitigate or negate the defendant's guilt, or would tend to reduce the defendant's punishment.
- Wire tap information
- Search warrant information
- Informants who will testify

Must Meet Discovery Deadlines

- Superior Court – 30 days after arraignment
- Limited jurisdiction courts – at first pretrial conference

Rule 15.1(c), Rules of Criminal Procedure

Discovery Sanctions

- Continuance was not appropriate sanction for untimely disclosed DNA evidence
- Preclusion was
- 4 part test:
 - Importance of evidence
 - Surprise or prejudice to opposing party
 - Bad faith
 - Any other factor

Jimenez v. Chavez, 234 Ariz. 448 (App. 2014).

Discovery Sanctions

- Precluded testimony of 3 defense witnesses
- Noted preclusion is rarely appropriate
- To preclude court must examine:
 - 1) How vital witness is to proponent's case
 - 2) Whether testimony will surprise or prejudice the opposing party
 - 3) Whether bad faith or willfulness motivated the discovery violation
 - 4) Any other relevant circumstances

State V. Naranjo, 234 Ariz. 233 (App. 2014).

Hot Case Law Topics

Fourth Amendment Opinions

Mistakes of Fact & Law

Can provide basis for a stop/seizure:

- IF objectively reasonable
- Subjective understanding of officer is not examined

Heien v. North Carolina, 135 S.Ct. 530 (2014).

(Should also apply to searches).

Voluntariness of Blood Draw

- Blood draw exception to warrant requirement [28-1388(E)] does not apply when person receives treatment against his/her will
- **NOTE:** defendant repeatedly told deputy did not want transport for treatment
- Deputy gave an ultimatum
- Should be limited to State action (*Estrada* also).
- *State v. Spencer*, No. CA-CR 13-0804

Seizure

- Officer Did Not Seize Defendant Even Though He Blocked in the Car.
 - Pulling in behind car & blocking it, in a marked police car was show of authority for seizure.
 - Defendant appeared unaware officer was there.
 - Did not submit to show of authority (physical force).

State v. Gonzalez, 235 Ariz. 212 (App. 2014).

Stop of Vehicle – Good Faith

- Officer who stopped car for no license plate but did not see temporary registration until after the stop, acted in good faith.
- Officer could contact driver to tell him he was free to leave.
- Beer cans & symptoms of impairment observed at that point permitted officer to proceed with DUI investigation.

State v. Nevarez, 235 Ariz. 129 (App. 2014).

DUI Opinions

Right to Independent Blood Test

- Defendant waived right to independent blood test when stated he would "take care of it later."
- Officer did not interfere with right by failing to tell defendant he would be booked into jail.

State v. Nevarez, 235 Ariz. 129 (App. 2014).

Marijuana DUIs

Medical Marijuana



- Marijuana is not a defense under A.R.S. § 28-1381(D) to A.R.S. § 28-1381(A)(3).
- Neither A.R.S. § 36-2802(B) nor 36-2802(D) provide immunity for defendants facing (A)(3) DUI charges.

Dobson v. McClennen (Mesa City Prosecutor's Office, RPI) 236 Ariz. 203 (App. 2014).

Medical Marijuana

- AMMA does not immunize a medical marijuana card holder from prosecution under A.R.S. § 28-1381(A)(3) even when drug is delta-9-tetrahydrocannabinol (THC), an active component of marijuana.

Darrah v. McClennen (Mesa Prosecutor's Office, RPI) 236 Ariz. 185 (App. 2014).

Judicial Notice on Appeal

- Appellate Court cannot take judicial notice of a fact that is an element of an offense (whether underlying offense was a felony)
 - Jurors must determine whether evidence supported each element of an offense
 - Jurors do not have to accept judicially noticed fact as conclusive

State v. Rhame, 235 Ariz. 459 (App. 2014)

Actual Physical Control

State v. Tarr, 235 Ariz. 288 (App. 2014).

State v. Tarr, 235 Ariz. 288 (App. 2014).

- **HOLDING:** Defendant was not entitled to requested stationary shelter instruction
- Defense stationary shelter jury instruction was a correct statement of law
- Zaragoza instruction adequately instructs the jury on APC
- Defense view – opinion says I get a stationary shelter instruction

***State v. Tarr*, 235 Ariz. 288 (App. 2014).**

- "Imminent control" language in APC instruction was proper
- Reiterated a suspect's purpose (whether to place the vehicle in motion) is not relevant to the charge

***State v. Tarr*, 235 Ariz. 288 (App. 2014).**

- Acknowledged State does not have to elect charges
- Circumstantial evidence of driving

Prepare & Propose APC Instructions

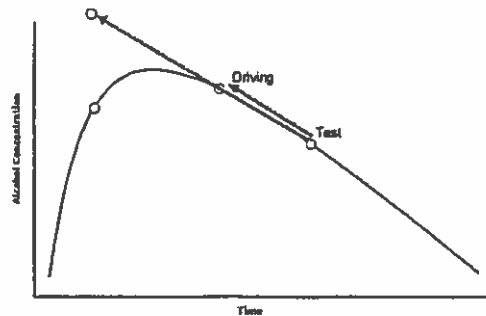
- Review & modify defense version
 - Change "threat to public" to "danger to himself or others"
- Definition of drive [ARS § 18-101(17)]
- APC does not require proof person intended to drive
- Not "stationary shelter" if danger exists
- Circumstantial evidence of driving

Retrograde Extrapolation

- Retrograde that did not use a full eating and drinking history was admissible under Rule 702
- *State v. Miller (Madrid, RPI) 234 Ariz. 289 (App. 2014).*

Alcohol Concentration Curve

Bolus Drinking Scenario



Blood Alcohol Results

- Expert witness who did not analyze blood sample may testify, in form of independent opinion, regarding blood test results conducted by another.
- When testifying expert provides own opinion, this is the witness defense has the right to confront.
- Documents were used only for basis of opinion, not to prove their truth, so fall outside scope of Confrontation Clause.

State v. Karp (Voris, RPI) No. 1 CA-CV 13-0599; State v. Pasqueira, 694 Ariz. Adv. Rep. 4 (App. 2014).

Additional Cases

Victim's Rights

- No provision of Victim's Bill of Rights allows victim's counsel to substitute for prosecutor in restitution hearing
- Substitution is not allowed

Lindsay v. Cohen (Meyn, RPI) No. 1 CA-SA 14-0186 (App. 1/13/15)

Corpus Delicti

- Circumstantial & independent evidence corroborated defendant's admissions to drinking & driving.
 - Defendant was found in home near crash scene
 - Visibly intoxicated
 - Nature of crash suggested impaired driving
 - Girlfriend indicated defendant sometimes drives the truck
 - Defendant's property in the truck

State v. Gill, 234 Ariz. 186 (App. 2014).

Case to Watch – Rule 702

- *State v. Bernstein* (Herman, RPI) 234 Ariz. 89 (2014)

- Scottsdale Crime Lab



Legislative Update






Defensive Driving School

HB 2308

- Allows attendance at defensive driving school every 12 months (instead of 24).

**Effective date 7/24/2015

Amends A.R.S. § 28-3392


 **Public Records - Victim Rights**

HB 2239

•Allows victim's attorney, on behalf of the victim, to get a free copy of police reports from investigating law enforcement

[In addition to the victim and victim's surviving immediate relatives].

**Effective date 7/24/2015
Amends A.R.S. § 39-127

 **Victim Rights**

HB 2203


•Allows victim's to get a free copy of any electronic recordings made during a postadjudication /post conviction release hearing.

**Effective date 7/24/2015
Amends A.R.S. §§ 8-395; 13-4414

Hot Topics

- E-cigarettes
- Alcohol

Breath Testing Basics



Thanks go out to the DPS Crime Lab for many of these slides.

Breath Alcohol Analysis

Direct Oxidation

- 1927 - Emil Bogen: The Diagnosis of Drunkenness; California and Western Medicine Vol XXVI, No 6
- Used Football to capture sample
- Won \$150 research price (\$866 by today's standards)

Breath Alcohol Analysis

Direct Oxidation

- 1938 - Rolla Harger
- Drunkometer
- Used colorimetric analysis:
 - Potassium chromate, silver nitrate, & sulfuric acid
 - Turns from yellow to green
 - Officer compares color change to a chart

Breath Alcohol Analysis

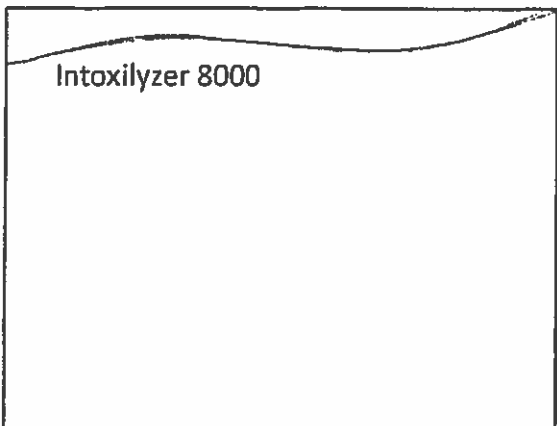
Direct Oxidation

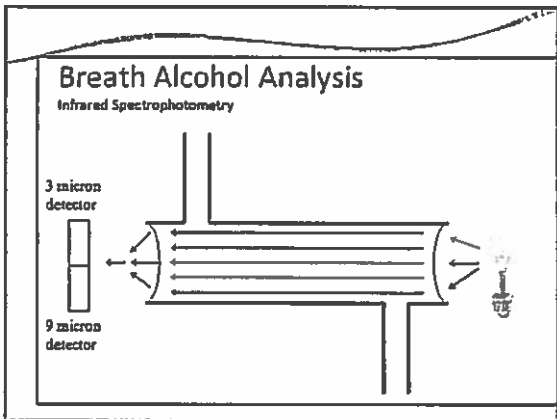
- 1954 – Robert F. Borkenstein
- Breathalyzer
- Used colorimetric analysis
 - Potassium chromate, silver nitrate, & sulfuric acid
 - Light meter measured change in color

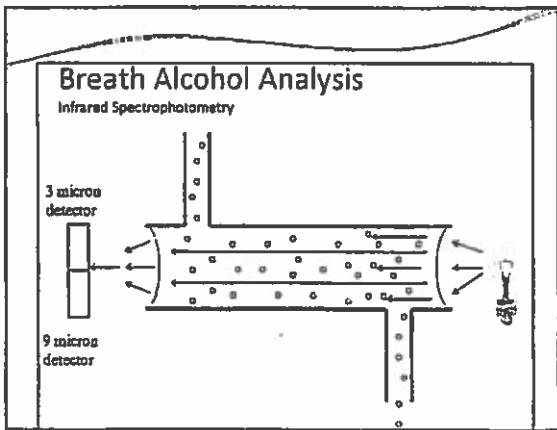
Breath Alcohol Analysis

Infrared Spectrophotometry

Intoxilyzer 5000







Blood to Breath Ratio

2100:1 will underestimate a blood result 95% of the time

Defendant's BrAC will typically be 10% below their blood alcohol concentration

Blood vs. Breath

To be certified by DPS, breath instrument must be capable of measuring alcohol to within $\pm 5\%$

CMI, Inc. states 3%

Intoxilyzer 8,000 Safeguards

- * 15 min deprivation period
- * Mouth Alcohol Detection
- * Processor Stability Checks
- * Air Blanks
- * RFI (Radio Frequency Interferent) Detection
- * Interferent Detection (3 & 9 micron)
- * Duplicate Testing Procedure
- * Calibration Checks

Breath Alcohol Analysis

Quality Assurance

- Quality Assurance Specialist

- 31-day Calibration Checks
- 90s-day Standard Quality Assurance Procedure

Breath Alcohol Admissibility

Statutory Method

28-1323(A)

- 1) DHS/DPS Approved Device
- 2) Certified Operator
- 3) Duplicate Tests (includes deprivation period)
- 4) DHS/DPS Approved Checklist
- 5) Device in Proper Operating Condition

28-1323(B)

These are the only requirements for admissibility

Common Breath Alcohol Ploys

- Blood/Breath Ratio
- RFI
- Mouth Alcohol
- 15 Minute Deprivation Period
- Breathing Patterns
- Test 29ml - Report 210L
- Interfering Substances
- 10% Off
- Duplicate Test Differences
- Steepling

4/20/2015

